Sneller Verbatim/mc

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J2251/00

2001-10-22

In the matter between

NEVILLE SMIT Applicant

and

WAP SA (PTY) LIMITED Respondent

J U D G M E N T

LANDMAN J: On 19 April 1999, WAP SA (Pty) Limited, dismissed Mr Neville Smit from his employment with them. A dispute arose and this was referred for conciliation to the Bargaining Council of the Steel and Metal Engineering Industry. The dispute was unresolved and a certificate of non-resolution was issued.

The matter was thereafter referred to the CCMA for arbitration. The arbitration hearing was set down for 29 March 2000. It is common cause that both parties received notice of this. Due to reasons beyond the control of the representative of Wap SA, he failed to attend the hearing. This was because he had been involved in a hi-jacking. The commissioner was clearly unaware of this

and granted an award in the absence of the company. The arbitrator ruled that Mr Smit had been constructively dismissed. He awarded Mr Smit compensation.

Some time later that day the company's representative attended at the hearing and explained his reasons for not being at the arbitration hearing. The commissioner informed him that he could apply for the rescission of the award. An application for rescission was launched on 19 April 2000.

During the course of June 2000 Mr Smit lodged an application in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 to make the award an order of court. On 12 June the company sent a fax to this court and to Mr Smit's attorney, that an application for rescission of the award had been filed with the CCMA. The Labour Court made the award an order of court on 12 September 2000. On 19 September 2000 the CCMA forward a notice of the hearing of the rescission application. On 29 March 2001 the CCMA rescinded the award.

The application which is currently before me is an application for the rescission of the court order which was granted on 12 September 2000. When Mr Smit applied for default judgment on 12 September 2000, his attorney, Mr Verster, very properly filed an affidavit in which he drew attention of the court to the following matters:

"To date hereof neither the applicant nor its legal representative has received any notice or copy of such alleged application for rescission.

6. The applicant's legal representative advised respondent by fax letter that its application for rescission as well as its reply in this matter was defective and not in accordance with the rules of the CCMA and/or Labour Court.

Applicant encloses copies of the correspondence referred to herein marked JDV1 and JDV2 respectively.

7. Until date hereof no response or reply has been received from respondent.

8. On 1 August 2000 the registrar of this court directed the respondent to file an answering affidavit together with proof that the rescission application was served on the applicant and filed with the CCMA within 10 days.

9. The respondent has to date hereof not complied with such direction.

10. In the circumstances the applicant has no option but to proceed with the application to the above honourable court."

The failure of the company to heed the warnings of Mr Verster and the request of the registrar justifies the inference that the employer was in wilful default of pressing its case in this court. The circumstances which I have outlined in the passage quoted above, served before the judge hearing the matter and it was, I assume, clear to that judge that the company had not properly opposed the application.

The employer may have had the good cause for rescission, taking into account the reason why its representative was unable to attend the arbitration hearing. I do not know what the company's case was as regards the merits set out in the application for rescission. The commissioner remarked that there was a *bona fide* defence. However, I do not know what that defence was and I am not able to subordinate my judgment to that of the commissioner, particularly where I do not know facts or basis on which he arrived at his decision.

The employer, by its refusal to comply with the rules and processes of this court and by ignoring the warnings sent to it by Mr Verster and the registrar, is unfortunately the author of its own misfortune.

In the circumstances therefore the application for rescission is dismissed with costs.

_____

A A Landman

Judge of the Labour Court of South Africa

---o0o---